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STATEMENT OF FACTS*

Plaintiffs David Saxner and Alfred Cain were prisoners at the Federal Penitiary in Terre Haute, Indiana in January of 1975. Saxner was serving a 4 year sentence for a marijuana related offense, while Cain was serving a 5 year sentence. [Tr. pp.4, 98] Both were within 18 months of their maximum release dates, both were due to appear before the Parole Board within the next few months, and both had excellent prison conduct records. [Pl 10, 15]

On January 6, 1975, a black prisoner, William Lowe, died in the Terre Haute Prison hospital under highly suspicious circumstances. He was the first of four black prisoners to die in the hospital in the next seven month period. [Tr. p.5] Lowe's death triggered extreme concern among Terre Haute prisoners, and many participated in a peaceful two day work stoppage on January 7th and 8th to protest his death. [Tr. p.7, Pl. 1] Neither Plaintiff participated in this work stoppage. [Tr. pp.7-8, 118] Rather Saxner, a white prisoner and respected "jailhouse lawyer," and Cain, a black prisoner and the librarian for the African and New World Cultural Society, concentrated their efforts on gathering information concerning Lowe's death and the conditions at the prison hospital, and on informing interested members of the press, Congress, prison officials, and Saxner's attorney, ACLU lawyer Arpiar Saunders, of the results of the investigation. [Tr.

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*The facts of this case, as summarized in the opinion of the Seventh Circuit and by the Defendants in their brief, fall far short of capturing the reality of the disciplinary hearings afforded to the Plaintiffs pursuant to the Federal Bureau of Prisons Policy Statement on discipline in effect in 1975. Plaintiffs have therefore submitted this detailed Statement of Facts in order that this Court may be fully informed of the proof at trial.

pp.9-10, 118-119] This investigation included the interview of several prisoners who had recently been confined in the prison hospital. [Tr. pp.14-16, Pl. 3] As a result of Plaintiffs' work, a judge, a senator, and several congressmen were contacted, and they wrote letters to the Warden. A national letter writing campaign was launched, accounts were written in several publications, the Assistant Surgeon General came to Terre Haute to investigate, the prison doctor resigned, and ultimately a lawsuit arising from the last of the four hospital deaths was filed. [Tr. pp.9-12, 92-3, 166-7, 179-80, 183] *See Green v. Carlson,* 581 F.2d 669 (7th Cir. 1978) aff'd *Carlson v. Green,* 446 U.S. 14 (1980). During the six weeks following Lowe's death, a "considerable amount of momentum" had been built with Congress, lawyers, and others by the Plaintiffs' investigation. [Tr. pp.18-19]

On February 14, 1975, Plaintiff Saxner was scheduled to appear on local television as part of a cultural program. [Pl. 21] Instead he was called to the Captain's office and told that he was to be transferred to the Prison Farm—a separate enclave where he would be unable to continue his investigation. When Saxner protested the transfer, he was charged with encouraging others to refuse to work. [Tr. pp.20-23] He was taken to an isolated and unused part of the hospital which was temporarily being used as a segregation unit and locked in a cell. [Tr. p.23] An hour later Cain was placed in an adjoining cell, for an identical charge. [Tr. p.24]

Both Plaintiffs remained locked in segregation at the hospital 24 hours a day for the next seven days. [Tr. p. 23] On February 21st, they were brought before the institutional Disciplinary Committee (IDC) for a "hearing"

on the charge. The Committee was made up of three long-time Bureau of Prisons employees who had worked their way up through the ranks from prison guard. Defendant Cleavinger, the Assistant Warden of Programs, was the Chairman of the Committee. He was in charge of the correctional force, education, and classification and parole within the prison, and had been a correctional officer for twenty-one years. [Tr. pp.346-371] Defendants Lockett and Marcadis, two other long-time correctional employees, were the other members of the IDC. Lockett was in charge of classification and parole while Marcadis was an "operational lieutenant", acting Captain, and in charge of the Segregation Unit. [Tr. p.231]

The Warden sought as IDC members those officers who had "dealt with inmates on a more daily basis" There was no training, instruction or education given to these IDC members, other than that they were to follow the policy statement on discipline. [Tr. pp.229-230, 272-3]

The Bureau of Prisons Policy Statement on Discipline which was operative on and before February 14, 1975, [Pl. 7] did not provide for the presence or cross examination of adverse witnesses, representation by a lawyer, a taped or otherwise verbatim record of the proceedings, a standard of proof, clearly defined standard of punishment, or for non-agency or judicial review. Although the policy statement permitted a prisoner to call witnesses unless security or repetition prevented it, that was not the practice at Terre Haute. By the Defendants' own admission, live testimony was "not the common way" and guards never appeared before the Committee to present evidence. [Tr. pp.387, 401]

Saxner was brought before the Committee on the charge of "Encouraging Others to Refuse to Work." The "investigation" of the incident stated that Saxner:

> . . . stated that this charge was totally absurd and that he was categorically innocent. He stated that he was charged with this because he refused to go to the Farm Camp. He said he had nothing else to say. His attitude was fair during the interview,

and listed as "other facts" only that "considering the various items picked up from this man's cell, I would say there is little doubt about his activities." [Pl. 5, p.2]

These items, obtained in a search of Saxner's cell, were attached to the report. They consisted of a four page "press release" entitled "Prisoners at Terre Haute Seek an Investigation" which Saxner had sent to fifty newspapers [Pl. 1, Tr. pp.11-12]; a four page document which detailed interviews with prisoners on the subject of their medical treatment at the hospital [Pl. 3]; and a letter from Saxner to ACLU lawyer Arpiar Saunders which enclosed the other two documents and which discussed medical conditions, possible lawsuits on behalf of the Lowe family and segregated prisoners, communications with the press, and the obtaining of local lawyers. [Pl. 4] The remainder of the investigator's report consisted of his conclusion "guilty as charged. A definite ringleader in the activity charged." [Pl. 1]

Neither the investigating nor charging officer was brought before the committee, nor was any more detail provided from them in writing. The "information" allegedly "received" by the charging officer—that Saxner was encouraging the work stoppage—was not detailed or verified in any way. Saxner professed his innocence, offered to take a lie detector test at his own expense, requested that he be permitted to call inmates to confirm that he was not encouraging a work stoppage, and to confront his accusers. [Tr. pp.34-35] All of these requests were denied.* The committee presented the aforementioned documents as its "evidence" against Saxner, and when it said that was all the evidence it had, both Saxner and his correctional employee representative told the Committee that the charge was "preposterous," and that it had presented no evidence of encouraging a work stoppage. The staff representative said that the committee would have to "reword the charges or present more evidence because . . . the evidence didn't correspond to the charge." [Tr. pp.31-32]

The committee then caucused and, *sua sponte*, orally charged the Plaintiff with two new "offenses": "unauthorized use of the mails" for mailing the press release through the "Prisoners Mail Box" (P.M.B)** and possession of "contraband" for possessing the seized documents. [Tr. p.32] Saxner was given no written notice whatsoever of the new charges, and no time to prepare a defense. [Tr. p.35] Even the Warden admitted that these actions directly violated existing BOP policy with regard to notice and committee composition.***

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*The requests for witnesses were denied because they were allegedly repetitive of affidavits presented by Saxner. [Tr. pp. 357-358]. The Committee's attitude about the credibility of prisoner testimony is demonstrated by its statement that it would be "very foolish" to take other prisoners' evidence because they would not admit that Saxner had committed an infraction. (Def. Ex. 10, p. 2, J.A. 58)

**The Policy Statement on the Prisoners Mail Box which was operative at that time expressly provided for its use for mail to the media. [Pl. 2, p.11]

***The Policy Statement provided that the prisoner be given notice of the offense in writing within 24 hours of its commission, and at least 24 hours before the hearing [Pl. 7,

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The non-verbatim "record" of the hearing which was never tendered to the Plaintiff, shows that the Committee interrogated Saxner at length with a primary focus on the contents of the seized documents and on the Plaintiffs' investigation, the contents and veracity of which the committee members repeatedly and defensively challenged. [See Def. 10, esp. pp.3-5]

Saxner protested to the Defendant Committee members that their actions violated BOP policy and the Constitution [Tr. p.33], but they nonetheless found him guilty of all three charges. [Tr. p.36] Their written "findings" did little more than reiterate the proffered charges,* and the testimony of the IDC Defendants at trial revealed that their reasons for finding Saxner guilty were confused, contradictory and did not support a guilty finding on any of the charges. This testimony further showed that the Defendants improperly considered the contents and dissemination of the documents and Plaintiffs' investigation to be evidence in support of the work stoppage charge, and lent substantial support to the conclusion that it was for these constitutionally protected activities that both Saxner and Cain were in reality charged and convicted.**

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pp. 9,10]; and further that committee members could not have also investigated, witnessed or reported the incident. [Ibid., p.10]

*Under "Reason for Action Taken" the Committee wrote: "Saxner was found Guilty of Encouraging Others to Refuse to Work from the information received from staff and the written and investigative reports. He was also found Guilty of Unauthorized Use of Mail (701) (sending manuscripts out) and Possession of Contraband (article from Prisoners Union, Leavenworth Penitentiary). It is felt the Education Supervisor, or his representative, should talk with Saxner regarding manuscripts and the regulations." (Def. 10)

**Defendant Cleavinger said that the documents [Pl. 1,3] "advocated an investigation" of Lowe's death, that they "talk(ed) against the institution and want(ed) to say that we

(Continued on following page)

Plaintiff Cain was then brought before the same IDC on an identical "encouraging" charge. He too denied the charge, offered to take a lie detector test, and requested the right to confront his accusers. These requests were denied [Tr. p.102] During the hearing a second charge—possession of contraband—was brought without prior notice. [Tr. pp.106-107] The "contraband" was a 1973 letter to the Bureau of Prisons from "Inmates of Terre Haute Prison" which set forth the case for a prison labor union at Terre Haute. [Pl. 14] This document, seized from Cain's cell, was also available from the Cultural Society library. [Tr. pp.114-116] According to the hearing "record," Cain was interrogated as to whether he supported, was "talking up," or forming a labor union. Cain denied that he was, but professed that a union would be beneficial. Defendant Lockett then told him to shut up. [Tr. p.104, Pl. 15, p.2] Cain was shown Saxner's letter to attorney Saunders, and Marcadis asked him if he had anything "in his possession that was encouraging dissension or un-

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are doing wrong things which is wrong" [Tr. p.356], thereby making them "contraband" and their possession a violation of the "encouraging" provision as well. [Tr. pp.356-7, 373-4] He redefined the press release to be a "manuscript" because it named staff and inmates for publication and therefore claimed that sending it through the PMB, where it would not be censored, was "unauthorized use of the mails." [Tr. pp.376-80] No policy statement or other such document defined a manuscript in this way, forbade the naming of staff or other prisoners in either a communication to the press or a manuscript, or made the mailing of a manuscript, either by PMB or regular mail, a disciplinary offense [see and compare Pl. 2, para. 3; Def. 2, particularly para. 41, 5(a) (1), (2) and (15); Pl. 22, para. A, and para.5, p.2]. Marcadis said that the documents supported the work stoppage charge because they were "inflammatory" and referred to the Lowe death as "murder." [Tr. pp. 396-397] Similarly, Benson testified that Saxner had no reason or right to investigate as he was not a "medical doctor." [Tr. p.268]

rest, or an attitude to encourage people to get up in arms in violation of the rules." [Tr. pp.102-103, Pl. 13, pp.2-3] Cain denied this as well, stated that he had spoken against the January work stoppage, and cited the proximity of his parole hearing and jeopardizing his college classes as further reasons why he would not have committed the offenses. [Pl 13, pp.1,3] The "record" of the hearing further stated that "Cain identified Saxner as the writer of the letter to Arpiar Saunders." [Pl. 4, p.3]

Cain, like Saxner, was found guilty of all charges. Both men were sentenced to an indefinite stay in segregation and had approximately three months of good time "forfeited."

Cain was held in L Unit until March 21, 1975, making his entire period of segregation on these charges 35 days. He was confined in his cell for more than 23½ hours a day, had no access to the prison yard or exercise facilities, and was permitted to go outside for only one-half to one hour per week, rather than the six hours per day which was permitted in general population. He could shower and shave only twice a week, could not attend his college classes, or use the law library or educational facilities, and had to eat in his cell rather than in the cafeteria. [Tr. 52, 108-9, 235-6] His cell window was broken, and he was deprived of much of his personal property; many books, papers and his radio was never returned to him. (See Pl. 23) He could not go to his job in the paint shop, and therefore could not earn good time which would shorten his maximum outdate. [Tr. 110-11] He could not participate as librarian of the New World Cultural Society. [Tr. 111-12]

While in segregation he was "highly frustrated" and "nervous," because he "was locked up for something he didn't do" for an indeterminate period of time, and be-

cause he could not make parole unless the case were overturned. [Tr. 123] In fact, Cain did not make parole in June, and instead was released on his maximum outdate in December, a date which he was unable to shorten by earning good time while he was segregated.

Saxner was sent to G Unit and spent the first week in the Unit's first cell. The cell had no window or functioning light bulb, and he spent the first five days in near total darkness until his complaints were heard and a new light bulb supplied [Tr. 41-2] The conditions in the cell were "repulsive." Vomit and feces were caked on the walls, floor and toilet seat. He was not permitted to leave his cell, where it was extremely hot due in part to poor ventilation. [Tr. 41-2, 46, 78] He had no pillows, blankets or sheets and no cleaning materials for several days, although he repeatedly requested them. The unit was "infamous" for beatings, and he witnessed a beating during his stay there. [Tr. 37-40, 55] Conditions in G Unit were even more restrictive than in L, as it was used to house especially dangerous prisoners. [Tr. 37-40, 77] Saxner brought these repulsive conditions to the specific attention of Defendant Cleavinger by a letter dated February 24th [Pl. 8, Tr. 43-44], and in person to Defendant Marcadis who visited G Unit a "number of times" during the week Saxner was held there. [Tr. 45] After seven days, he was transferred to L Unit for an additional two weeks, where he was subjected to similar conditions as Plaintiff Cain. He too spent a total of thirty-five days in segregation.

Saxner likewise suffered fear and anxiety while in segregation. He feared physical harm, particularly while in G Unit. [Tr. 55] He lost weight, and harbored a constant fear that he would not make parole because it was Bureau of Prisons' policy to deny parole if a prisoner had

lost good time in the six months prior to the Board appearance. [Tr. 54, 55] He had a deservedly high expectation of making parole before the loss of good time, and dreaded the loss of fifteen months of freedom during his entire stay in segregation. [Tr. 53, 58, Pl. 10]

It was Bureau of Prisons policy for the IDC committee to "review" segregation cases after ten days. [Tr. 366] The Defendants, if they followed Bureau of Prisons policy, held this review and continued Plaintiffs in segregation. The Plaintiffs appealed to Warden Benson, and, on March 21st their appeal was partially granted at his recommendation. They were returned to general population and their good time was restored, but their request for expungement was denied. (Pl. 10) They appealed to the Regional Office of the Bureau of Prisons, and after the Regional Office so recommended, the Plaintiffs were granted expungement on April 11th. [Tr. 63] Warden Benson claimed that the action was taken because of pressure from Saxner's family, and because of due process violations [Tr. 273, 275] rather than due to their innocence; the Bureau Policy Statement on Discipline, however, mandates expungement only where the "inmate has been determined innocent of the charges." [Pl. 7, para. 9(d) (1), at p.12]

Saxner appeared before the Parole Board on April 11, 1975, was granted parole, and was released an April 25th. Cain went to the Board in June, but was continued to his maximum date in December, when he was finally released. Both have remained on the street since that time, both have families, and both have been gainfully employed since their release. [Tr. 3-4, 97]

SUMMARY OF ARGUMENT

This court has established the general rule that executive government officials are entitled to only qualified immunity from damage liability for constitutional deprivations. In *Butz v. Economou*, 438 U.S. 478 (1978) this court carved out a rare exception to this rule, holding that certain executive officials — specifically administrative law judges operating under the Administrative Procedure Act — were "functionally comparable" to judges and were entitled to "quasi-judicial" immunity for acts committed in their adjudicatory capacity. *Butz* made clear, however, that performance of an adjudicatory function was a necessary, but not a sufficient, prerequisite for extension of "quasi-judicial" immunity. To be eligible for such immunity, the official must share other characteristics of judges — they must adjudicate in a process in which their independence guarantees the impartiality of their decisions, and in which there exists sufficient procedural safeguards to insure the reliability of their rulings.

Butz found that administrative law judges operated in such an adjudicatory process. In sharp contrast, Prison Institutional Disciplinary Committee members do not possess the independence necessary to the extension of "quasi-judicial" immunity. They are not professional hearing examiners, but are ordinary prison officials who are temporarily diverted from their usual duties. They are employees of the Bureau of Prisons; they are the direct subordinates of the Warden to whom review of their decisions go; they are the co-workers and peers of fellow guards who bring charges against the prisoners upon whom they sit in judgment and whose credibility they must often weigh against that of the prisoners.

Nor does the prison disciplinary process contain any of the substantial procedural safeguards contained in the Administrative Procedure Act which this Court in *Butz* found necessary to application of "quasi-judicial" immunity. Prisoners are afforded neither a lawyer nor an independent non-staff advocate. There is no right to compel witnesses nor to cross-examine adverse witnesses under oath; there is no right to discovery, rebuttal, findings of fact or conclusions of law. Nor is there a cognizable burden of proof, no verbatim transcripts of the proceedings are made, and the charges of misconduct are often vague, overbroad, and lend themselves to selective enforcement and arbitrary misapplication.

Rather than administrative law judges who operate under the APA, prison IDC members are more akin to the school board members of *Wood v. Strickland,* 420 US 308 (1975) who, among their other duties, sometimes must function as adjudicators in the school disciplinary process, and who are entitled to only qualified immunity.

It is clear that the proper balance to be struck between the right of prisoners to a damage remedy and the legitimate concerns of prison IDC members is to afford the latter only a qualified immunity from damage liability for constitutional deprivations. This will allow prisoners to be compensated for serious constitutional deprivations and will provide a necessary deterrent to future abuses.

Moreover, officials who possess qualified immunity are gaining an increasing arsenal of tools which allow them to promptly dispose of any potential "harassment" lawsuits with a minimum of cost and inconvenience. Under this Court's modification of the qualified immunity standard in *Harlow v. Fitzgerald,* 457 US 800 (1982), a defendant is entitled to such immunity if it can be shown that the right alleged to be violated was not clearly established, thus allowing for prompt disposition without the necessity of pretrial discovery proceedings. And if the claim of qualified immunity is denied, the official is entitled to a pretrial appeal of that ruling. Moreover, under *Harlow,* the motivation or malice of the official is no longer relevant.

These legal weapons are more than sufficient to protect defendants from any perceived threat of harassment. In the context of prison disciplinary cases, all the IDC officials need to do is follow the simple constitutional requirements of *Wolff v. McDonnell,* 418 US 539 (1974), and they have no reason to fear harassment or liability.

If the government is truly concerned with the effects of potential financial exposure of its prison officials, it can take steps which are less drastic than affording such officials absolute immunity from liability. Among other things, it can indemnify them against money judgments or it can amend the Federal Tort Claims Act to allow claims directly against the government for constitutional deprivations which occur at IDC hearings. Or, the government can hire independent adjudicators, such as administrative law judges, to preside at procedurally sufficient prison IDC hearings who then may, unlike prison guards, be entitled to "quasi-judicial" immunity.

Lastly, even if IDC members were afforded absolute immunity for their adjudicatory functions, it would not benefit them in the instant case. Here, one of the major due process violations found by the jury—the bringing of additional charges without notice in the midst of the hearing by the IDC members themselves—is clearly not an adjudicatory function.

The Defendants, As Members Of A Prison Institutional Disciplinary Committee, Are Entitled To Only A Qualified Immunity From Damage Liability For The Deprivation Of A Prisoner's Constitutional Rights.

In a series of decisions announced over the years, this Court has definitively established the general rule that executive government officials are entitled to only a qualified immunity from damage liability for constitutional deprivations. *See Pierson v. Ray,* 386 U.S. 547 (1967) (police officers); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state governor and his aides); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board members); *O'Connor v. Donaldson,* 422 U.S. 563 (1975) (superintendent of state hospital); *Procunier v. Navarette,* 434 U.S. 555 (1978) (prison officials); *Butz v. Economou,* 438 U.S. 478 (1978) (federal cabinet member); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (presidential aides). This general rule is, however, subject to those exceptional situations where it is demonstrated that absolute immunity is "essential for the conduct of the public business," *Butz,* 438 U.S. 478, 507 (1978).

The nature of the absolute immunity which has been extended to executive officials falls into two distinct categories—"executive" immunity and "quasi-judicial" immunity. Thus, in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), the President of the United States was found to be entitled to absolute executive immunity as a functionally mandated incident of his unique office. Thus far, the President is the only executive government official who has been found to be entitled to such absolute executive immunity.

The second type of absolute immunity which has been extended to executive officials—"quasi-judicial" immunity—is itself comprised of two types. One such type applies

to executive officials, such as prosecutors, who are so intimately connected to the judicial process that they are entitled to an absolute immunity when they are performing a "quasi-judicial" function. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). The second type arose out of this Court's recognition in *Butz v. Economou,* 438 U.S. 478 (1978) that certain executive officials—specifically administrative law judges subject to the Administrative Procedure Act (APA)—were "functionally comparable" to judges and were entitled to "quasi-judicial" immunity for acts committed in their adjudicatory capacity. The Court reached this conclusion, however, only after finding 1) that the adjudicatory process at issue guaranteed the independence of the administrative law judges and contained sufficient procedural safeguards to reduce the need for private damage actions as a means of controlling unconstitutional conduct; 2) that the responsibilities of the hearing officers were functionally comparable to those of a judge and the specific acts complained of were adjudicatory in nature; and 3) that the performance of the officials' adjudicatory duties made him or her a likely target for harassing or intimidating litigation. *See Butz,* 438 U.S. at 512-513.

The defendant administrative law judges in *Butz* met each of these requirements. The Defendant Institutional Disciplinary Committee (IDC) members here do not. Nevertheless, these Defendants contend that simply because they perform an "adjudicatory" function when they determine whether prisoners have violated institutional rules, they are entitled to be cloaked with the absolute "quasi-judicial" immunity of *Butz.* This simplistic argument is without support in the decisions of this Court and would result in an unwarranted and unjustfiable extension of the extraordinary doctrine of absolute immunity.

Performance of an adjudicatory function is a necessary, but not a sufficient, prerequisite for application of "quasi-judicial" immunity. *Butz* made clear that to be eligible for such immunity, the official must share other characteristics of judges in our judicial system. That is, they must adjudicate in a process in which their independence guarantees the impartiality of their decisions, and in which there exist sufficient procedural safeguards to insure the reliability of their rulings. *Butz*, 438 U.S. at 508-514.

I. Prison IDC Members Do Not Possess The Independence And Impartiality Of Judges Which Are Necessary To Extension Of "Quasi-Judicial" Absolute Immunity.

The main purpose underlying the doctrine of absolute judicial immunity is to preserve "that independence without which no judiciary can either be respectable or useful." *Bradley v. Fisher*, 13 Wall 335, 354, 20 L.Ed. 646 (1872). This immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

In extending absolute "quasi-judicial" immunity to administrative law judges, this Court in *Butz* emphasized that their independence and impartiality contributed heavily to the concluson that they were "functionally comparable to judges." The Court stated:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence,

> regulate the course of the hearing, and make or recommend decisions . . . More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.

Butz at 513.

In fact, the *Butz* court commented at great length on the legislative history of these provisions of the APA which protect this independence:

> Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see *e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigate or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is prac-

ticable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is also controlled by the Civil Service Commission.

Butz at 513-514.

Recognizing the importance of independent adjudicators to application of "quasi-judicial" immunity, the Defendants here make repeated references to the necessity of preserving the "freedom and independence" of the IDC decision makers. (Defendants' Brief at 26, 31). However, to describe prison IDC members as "independent" is to ignore reality.

IDC members "are not professional hearing officers, but ordinary prison officials temporarily diverted from their usual duties." *Ward v. Johnson,* 690 F.2d 1098, 1115 (4th Cir. 1982) (Chief Judge Winter, dissenting). They are employees of the Bureau of Prisons and the direct subordinates of the Warden, to whom review of their decisions go; they are the co-workers and confederates of fellow guards who bring charges against the prisoners upon whom they sit in judgment and whose credibility they must often weigh against that of the prisoners. Given the subordinate relationship of the IDC "adjudicators" to the institution and the peer relationship and loyalty they share with individual guards who bring charges against prisoners, it is apparent that IDC members are under great pressure to resolve disciplinary disputes in favor of the institution and fellow guards.* Despite the

*"(T)he reality that disciplinary boards, composed of correctional officials, may be overly inclined to accept the word of prison guards and refuse without reason to hear witnesses cannot be ignored."

Ponte v. Real, 471 U.S. —, 105 S. Ct. 2192,2204 (1985) (Marshall, J., dissenting). The attitude of IDC members about the

(Continued on following page)

Defendants' attempts to do so, IDC members cannot in good faith be described as "independent".

Moreover, apart from these pressures which preclude independence, the realities of day-to-day prison life make clear that IDC members can in no sense be considered "impartial" adjudicators. Prison officials who sometimes serve on IDCs, like other prison officials, strongly identify with the institution they serve in disputes which arise between that institution and its prisoners. This partiality is underscored by the testimony of defendant IDC member Cleavinger at the trial below, whose stated motivation for disciplining the plaintiffs was that they had "talk(ed) against the institution and want(ed) to say that we are doing wrong things which is wrong." [Tr. 356]

These pressures and predilections which bias IDC members in favor of the institution and fellow guards result in an equally great bias against prisoners who face discipline. As the defendants themselves recognize in their brief, this Court noted in *Wolff v. McDonnell,* 418 U.S. 539, 562 (1974), that prison disciplinary proceedings take place against a background in which prison officials and prisoners "co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace." The dramatically unequal relationship between keeper and kept permeates the entire prison environment and is aptly demonstrated here by the fact that defendant Marcadis, as an Operational Lieutenant in charge of the Segregation Unit, directly supervised the Plaintiffs' custody and con-

(Continued from previous page)

credibility of prisoner testimony is demonstrated by Defendant Lockett's statement that it would have been "very foolish" to take other prisoners' evidence because they would not admit that Saxner had committed any infraction. (Def. Ex. 10, p.2, J.A. 58).

trol while they were in segregation, while Cleavinger and Lockett were in charge of their classification and parole.

Given this environment, it cannot be argued that a prison official who temporarily serves on an IDC is comparable to an independent, impartial administrative law judge. As Judge Cudahy succinctly stated in his concurring opinion below:

> The committee members are prison guards and supervisory employees who are in daily contact with the prisoners upon whom they sit in judgment. The committee members are supervisors and fellow employees of the guards who bring the charges and are in an unequal adversarial relationship with the prisoners. They are the keepers judging the kept rather than impartial adjudicators trained in law and presumably free of bias and prejudice.

Saxner v. Benson, 727 F.2d 669, 675 (7th Cir. 1984), (Judge Cudahy, concurring).*

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In support of their quest for absolute immunity, the Defendants argue that the most relevant officials with whom to compare IDC members are parole board members. Relying upon *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir. 1981), *cert denied*, 454 U.S. 1102 (1981) and *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982), the Defendants point out that several courts have granted parole board members such immunity.**

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*Moreover, the normally unequal and adversarial quality of the inmate-keeper relationship was further exacerbated here by the Plaintiffs' outspoken public criticism of the Defendants and their institution, whom they were investigating on serious charges of official misconduct. The evidence at trial strongly suggested that Plaintiffs were charged and punished by these Defendants in retaliation for pursuing these constitutionally protected activities. See Statement of Facts, (Supra) at p.6, Fn. **.

**This Court has not yet ruled on the issue of what, if any, immunities are available to parole board members. *See Martinez v. California*, 447 U.S. 277, 284 (1980).

Whatever the propriety of these decisions, they are easily distinguishable from this case, because there is a fundamental difference between parole board members and IDC members. This Court recognized in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), that a parole board is a "neutral and detached" hearing body. In *Sellars v. Procunier*, while holding that members of the California Adult Authority were absolutely immune from damage liability, the Ninth Circuit stressed that its members, like judges, functioned in an "independent dispute resolving system," 641 F.2d at 1299-1300, and noted that in deciding to grant, deny or revoke parole, the members "act in a quasi-judicial capacity *as an arm of the sentencing judge.*" 641 F.2d at 1302, note 15. (emphasis supplied)

In *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982), the Seventh Circuit, relying on *Sellars*, held that members of the Illinois Prisoner Review Board were entitled to absolute immunity. In so holding, the Court emphasized Illinois statutes which guarantee the independence and professionalism of the board.*

Parole board members are impartial professionals who serve in no other role.** Their background, training

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*Illinois statutes provide that the Prisoner Review Board shall be "independent of the Department of Corrections," consisting of 10 persons appointed by the Governor by and with the advice and consent of the Senate, who have at least five years actual experience in the fields of penology, corrections, law enforcement, sociology, law, education, social work, medicine, psychology, [illegible] other behavioral sciences. Ill. Rev. Stat., Ch.38, § 1003-3-1. [illegible] statute creating the California Adult Authority contained similar provisions. See Cal. Pen. Code, §§ 5075, 5076.

**In addition, parole board hearings offer substantial procedural safeguards which are not present at IDC hearings, such as the right to counsel, to testimony under oath, to a transcript of the proceedings and the right to confront and cross-examine adverse witnesses. *Rules Governing Parole*, State of Illinois Prisoner Review Board. See argument below at Part II.

and complete independence from the prison administration place them in sharp contrast to IDC members who are "ordinary prison officials temporarily diverted from their usual duties." *Ward v. Johnson*, 690 F.2d 1098, 1115 (4th Cir. 1982) (Chief Judge Winters, dissenting).*

A more apposite comparison exists between IDC members and school board members who, among their other duties, sometimes must function as "adjudicators in the school disciplinary process." *Wood v. Strickland*, 420 U.S. 308, 319 (1975). Like IDC members, school board members "must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." *Wood*, 420 U.S. at 319.

Despite performance of an "adjudicative" function, this Court in *Wood*, after an extensive analysis, found that school board members would be adequately protected by a qualified immunity, concluding that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Wood*, 420 U.S. at 320. This conclusion is equally applicable here.

*Despite the Defendants' contention at page 10 of their brief, IDC's are not composed of "specially trained" prison officials. Typically, the IDC in this case was made up of three-long-time Bureau of Prison employees who had worked their way up through the ranks from prison guards, and were selected because the Warden sought officers "who had dealt with inmates on a more daily basis." They received absolutely no training, instruction or education other than that they were told to follow the policy statement on discipline. (Tr. pp.229-230, 272, 273). The Defendants' observation at page 31 of their brief that since June 1, 1983, only BOP personnel who have passed a written examination may serve on an IDC is commendable, but irrelevant to this case since the IDC hearing took place in 1975.

The Defendants seeks to distinguish *Wood* on two grounds. They first argue that in *Wood*, no claim was made that the school board members were performing a quasi-judicial function. (Defendants' brief at 33) This argument is belied by the explicit language of the Court's opinion in *Wood*, as quoted above.

Secondly, the Defendants argue that "there can be no meaningful analogy between *Wood* and cases involving prison disciplinary proceedings" (Defendants' brief at 34). Quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1977), the Defendants note that "the prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."

If the Defendants' intent in quoting this language is to leave the impression that prisoners require fewer constitutional protections than school children, they are grossly in error. In *Ingraham*, this Court drew the contrast relied upon by the Defendants to demonstrate the opposite proposition—that the schoolchild, unlike the prisoner, "has little need for the protection of the Eighth Amendment," noting that the "openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses for which the Eighth Amendment protects the prisoner." *Ingraham*, 430 U.S. 651, 670 (1977).

In sharp contrast to public schools, prisons are closed institutions which operate for the most part out of the public eye. Prisoners are members of a disfavored class who, more so than most others, must look to the courts for protection. The potential for abuse by prison officials, including IDC members, requires that the courts be espe-

cially reluctant to limit the remedies available to prisoners for deprivation of their constitutional rights.*

In any event, the proper analogy is not, as Defendants suggest, between schoolchildren and prisoners. Rather, it is between the members of a school board and the members of a prison IDC. As Judge Cudahy recognized in his concurrence below in *Sarner v. Benson*, 727 F.2d 669, 674 (7th Cir. 1984),

> [T]he prison disciplinary proceedings at issue here are certainly much more akin to the school board meeting in *Wood* than to a hearing conducted by an administrative law judge under the Administrative Procedure Act.

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Finally, a fundamental fact which the Defendants ignore is that there are pervasive influences on judges which distinguish them from IDC members, despite the fact that both may perform an adjudicatory function. Judges exist and operate in the millieu of the American judicial process. The traditions inherent in the judicial role within this process place restraints upon judges that cannot be casually dismissed. *See* K. Llewellyn, The

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*For some egregious examples of the abuse of the prison disciplinary process, see, e.g.: *Smith v. Rowe*, 761 F. 2d 360 (7th Cir. 1985) (22 months in segregation for being a jailhouse lawyer); *Sostre v. Rockefeller*, 312 F.Supp. 863 (S.D. N.Y. 1970) *aff'd. in pertinent part* sub nom *Sostre v. McGinnis*, 442 F.2d 178, 189-90 (2d Cir. 1971) (one year of segregation as punishment for being a jailhouse lawyer and black militant); *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) (excessive force used by IDC chairman at hearing); *U.S. ex. rel. Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975) (segregation for possession of a political newspaper); *Sostre v. Preiser*, 519 F.2d 763 (2nd Cir. 1975) (17 months segregation for wearing a ¼" beard); *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974) and *Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978) (8 months of segregation for refusing to handle pork for religious reasons). *See also Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).

Common Law Tradition, 46-50 (1960). As one noted commentary has observed:

> A final restraint—perhaps the most important—consists simply of the character of the vast majority of judges and the history, traditions, and procedural climate of the judiciary and the judicial system. With relatively minor exceptions, judges are selected from among a professional bar which has been imbued, both in legal training and in practice, with a sense of the judicial responsibility for maintaining dignity and fairness. Ritualistic displays of respect toward judges, manifested not only in court but also in informal gatherings, reinforce this sense of responsibility. In addition, the very formality and decorum of judicial proceedings tend to encourage fair and impartial judicial action and to discourage malicious or irresponsible statements.
>
> It seems reasonable to assume that these restraints and protections serve to minimize the possibility of injury at the hands of an irresponsible judge. This being so, the need for the additional remedy and restraint provided by a rule permitting personal liability tends to decrease.

Handler and Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44, 54-55 (1960).

As the Senate Report on the legislation which created administrative law judges observed, that legislation was designed "(t)o insure the independence and impartiality of the administrative process" and to "preclude the possibility of agency pressure or influence" on the administrative law judges. "In essence," the Senate Committee concluded, "individuals appointed as ALJ's hold a position with tenure very similar to that provided for Federal judges under the Constitution." Senate Report No. 95-697, 1978 U.S. Code Cong. and Admin. News 496, 497 (95th Cong. 2d Session).

In sharp contrast, IDC members exist and operate in the prison environment. They have continuing security responsibilities, and are unaffected by any restraints within the prison system which would minimize the need for a damage remedy on behalf of prisoners. As Judge Cudahy stated below:

> The activities and procedures of these prison officers are so dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash.

Saxner v. Benson, 727 F.2d 669, 674 (7th Cir. 1984) (Judge Cudahy concurring).

II. The Lack Of Procedural Safeguards Contained In The Federal Bureau Of Prison's Policy Statement Which Governed Institutional Disciplinary Proceedings At The Time Of Plaintiffs' Hearings Precludes Application Of "Quasi-Judicial" Absolute Immunity.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court recognized that prison disciplinary proceedings were an informal, non-adversarial means of imposing sanctions upon prisoners who had been found to violate institutional regulations, having its "utility as a means to further correctional goals." 418 U.S. at 569-570. As a result, the *Wolff* court held that prisoners who appeared at such proceedings were not entitled to those fundamental rights which attached to formal adjudicatory proceedings such as the right to counsel and the right to confront and cross-examine witnesses. Rather, prisoners were to receive only "those minimum procedures appropriate under the circumstances and required by the Due Process Clause" to protect them against arbitrary abrogation of state-created rights. *Wolff*, 418 U.S. at 557.

Prisoners charged with serious misconduct which could result in the loss of good-time credits were entitled only to receive advance written notice of the charges, the opportunity to respond to the charges to the extent that such response did not jeopardize institutional safety or correctional goals, and a written statement as to the evidence relied upon and the reasons for any disciplinary action taken. *Wolff*, 418 U.S. at 563-567.*

Subsequently, the Federal Bureau of Prisons adopted a Policy Statement on Discipline, based on *Wolff*, which outlined the procedures to be followed at prison IDC's. (J.A. pp. 25-49) The disciplinary hearings which have been held pursuant to the BOP's policy statement have been described by the courts as ranging from "informal", *Jihaad v. O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981), to inescapably "inquisitorial," *McCollum v. Miller*, 695 F.2d 1044, 1048 (7th Cir. 1982).**

Faced with the absence of most procedural safeguards necessary to insure the reliability of the findings of federal prison IDC's, the Defendants are compelled to argue to this Court that the presence of such safeguards in proceedings under the Administrative Procedure Act were not essential to the holding in *Butz*. (Defendants' brief at 17, 28-30) Despite this desperate attempt to re-

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*The non-judicial character of prison IDC proceedings has been reinforced by decisions of this Court subsequent to *Wolff*, holding that prison IDC's may rely upon evidence received subsequent to conclusion of the "hearing", *Baxter v. Palmigiano*, 425 U.S. 308, 322-323, n.5 (1976) and holding that the reasons for refusing to call witnesses requested by the prisoner need not be made part of the "record" at the IDC proceeding, *Ponte v. Real*, 471 U.S. —, 105 S.Ct. 2192 (1985).

**The inquisitorial nature of the proceedings here is demonstrated by the non-verbatim "records" of the plaintiffs' I.D.C. hearings which reflect a detailed interrogation of plaintiffs by the Defendants concerning their constitutionally protected activities in an obvious attempt to develop evidence to support the pretextual charges. (see J.A. pp. 56-67)

write *Butz*, it is clear that the presence of substantial procedural safeguards under the APA was one of the linchpins of this Court's decision to extend absolute immunity to administrative law judges.

In its analysis in *Butz*, this Court noted that absolute judicial immunity from damage liability was supported by the fact that "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Butz* at 512. Observing that federal administrative law required agency adjudication to "contain many of the same safeguards as are available in the judicial process," the *Butz* court concluded:

> *In light of these safeguards*, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that *persons subject to these restraints* and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. *Butz*, 438 U.S. at 513, 514 (emphasis added).

Despite the Defendants' argument to the contrary, it is clear that under *Butz*, absolute immunity attaches only to those executive officials who are engaged in an adjudicatory process which contains substantial safeguards, such as the impartiality of the decision-making process; the reliability of the information developed; the importance of precedent in resolving controversies; the adversary nature of the proceedings; and the availability of judicial review. *Butz*, 438 U.S. at 512-513.

The *Butz* court found that the Administrative Procedure Act contained sufficient safeguards since its protections included notice, representation by a lawyer, a

verbatim transcript of the proceedings, subpoena power, presentation of oral and documentary evidence, cross-examination of adverse witnesses under oath (limited only by considerations of relevancy and materiality), rebuttal evidence, and prehearing discovery. 5 U.S.C. §§ 554-557. The APA also provides for imposition of a burden of proof, and findings of fact and conclusions of law presented by the parties and ruled on by the hearing officer. Also, the hearing officer may not be involved in prosecutorial or investigative duties or be supervised by an employer interested in the case, and is subject to recusal for personal bias. 5 U.S.C. §§ 554-557, 701-702.

Comparison of the APA with the disciplinary policy of the Federal Bureau of Prisons in effect at the time of the hearings in this case clearly establishes that the prison disciplinary process falls woefully short of the requirements of *Butz*. It provided precious few of the procedural safeguards contained in the APA. Prisoners, typically uneducated and unschooled in law or procedure, were afforded neither a lawyer nor an independent non-staff representative. There was no right to compel witnesses or to cross-examine adverse witnesses under oath*: no right to discovery, rebuttal, findings of fact or conclusions of law. Nor was there a cognizable burden of proof,** no verbatim transcript of the hearings was made,*** and many of the charges of misconduct as listed

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*In fact, the general practice at Terre Haute Penitentiary in 1975 was not to permit any live testimony except from the charged prisoner, and guards *never* appeared before the committee to testify. [Tr. 387,401]

**Neither *Wolff* nor the Bureau of Prisons policy statement on discipline in effect at the time of the hearings in this case (J.A. 25-49) articulated any burden of proof whatsoever for prison IDC hearings.

***As is demonstrated here, the "record" is a subjective recitation by one of the I.D.C. members which reads like a police report not a transcript, and which the prisoner is not even allowed to see, let alone supplement or correct.

in the Policy Statement were so overbroad, vague, and undefined, as to themselves offend due process and lend themselves to selective enforcement and blatant misapplication*. As Judge Cudahy recognized in his concurring opinion below:

> The disciplinary policy of the Bureau of Prisons provides few of the safeguards of the APA. . . [T]he information presented to the committee is frequently hearsay, self-serving and unreliable. *See Bracy v. Herringa*, 466 F.2d 702 (7th Cir. 1972).** Of course, the decisions of the committee are not based on precedent since there is no recorded precedent. And review is restricted to agencies of the Bureau of Prisons. To suggest that the committee functions in any real respect like the administrative law judge in *Butz* is to depart from reality.

Saxner v. Benson, 727 F.2d 669, 675 (7th Cir. 1984) (Cudahy, J., concurring).

The Defendants substantially rely on *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982) which extended absolute immunity to members of Virginia State Prison IDC's. *Ward*, however, is easily distinguishable from the instant case. The Court in *Ward* considered the disciplinary procedures in effect in the Virginia state prison system. Under these procedures, a prisoner was entitled to be represented by a lawyer and afforded the right to confront and

*This is graphically shown here, where the charge "encouraging a work stoppage" is applied to investigating prison misconduct, possession of a document openly kept in a prison library and a letter to a lawyer become possession of contraband, and mailing of a press release becomes mailing of a "manuscript." *See also Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985), where defining a camera as contraband was found to be so vague as to violate due process.

**In *Bracy*, the Seventh Circuit held that reports by prison guards—which formed the entirety of the proof against prisoners in almost all hearings conducted under the BOP policy statement at Terre Haute—were inherently unreliable.

cross-examine his accusers. A tape recorded transcription of the proceedings was made and the prisoner had the right to present either oral testimony or written statements. The disciplinary committee was specifically barred from discovering the prisoner's prior prison record before guilt or innocence was determined. The Fourth Circuit relied heavily on these procedural guarantees, many of which were not required by *Wolff*, in determining that the hearing in *Ward* was "adversarial" within the meaning of *Butz*. Of course, the federal prison disciplinary policy at issue here provided for ***none*** of these safeguards.*

In support of their argument that procedural safeguards are not essential to extension of absolute immunity, the Defendants note that judges, in performing informal, ex-parte actions such as issuing search warrants and temporary restraining orders, still retain their immunity (Defendants' brief at 30). The examples cited, however, are not apposite to this case. The existence of substantial, well-established procedural safeguards in the American judicial system, which allows for absolute judicial immunity in the first instance, is sufficient to allow judges the latitude to engage in a number of limited, less formal proceedings, such as the issuance of search warrants or temporary restraining orders, both of which may be subsequently challenged by the affected parties at formal, plenary, adversarial hearings. In judicial proceedings, in-

*Although the procedures scrutinized in *Ward* were more complete than those afforded here, *Ward* was nonetheless wrongly decided given the *Butz* decision, as the procedures fell substantially short of those approved in *Butz* and, more importantly, the "independence" requirement was not met, as the Virginia IDC was comprised of prison officials rather than an independent hearing officer.

formality is the exception; in IDC hearings, it is the rule. Simply put, IDC members are not judges.*

Similarly, the Defendants argue that procedural safeguards are not essential to "quasi-judicial" absolute immunity since prosecutors and grand jurors, who do not operate under such safeguards, possess absolute immunity. (Defendants' brief at 16-17 20, 29). This argument, however, misses the essential point that these actors in the judicial process receive absolute immunity precisely and solely because of their "intimate association" with a process which *does* operate under substantial safeguards.** *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). As this Court stated in *Butz*, the "cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process . . ." *Butz*, 438 U.S. at 512. The Defendant IDC members here, in contrast, have no association, intimate or otherwise, with the judicial process and are not entitled to the "quasi-judicial" absolute immunity which has been extended to prosecutors, grand jurors, and witnesses.

Lastly, recognizing the lack of procedural safeguards at IDC proceedings, the Defendants argue that introducing more elaborate procedures "would be inimical to the needs of prison discipline and security." (Defendants' brief at 30). This observation, however, even if based in truth, provides no argument for extending absolute immunity to those who conduct such hearings. On the contrary, the purported necessity of informality at these hearings make availability of a damage remedy all the more essential to protect prisoners against the inevitable abuses which flow from such a lack of safeguards.

Some restraints on the behavior of government officials must exist to deter them from the abuse of constitutional rights. In the context of administrative proceedings, *Butz* held that an independent hearing examiner in combination with substantial procedural safeguards constituted an adequate restraint which served to minimize the need for a damage remedy. However, absent an independent adjudicator and sufficient safeguards, the only alternative restraint is a money damage remedy. See *Bivens v. Six Unknown Federal Narcotics Agents* 403 U.S. 388 (1971). The defendants here, however, invoking the shibboleth of prison security, argue that they must not be subject to *any* restraints. They want to maintain the extreme informality of their proceedings, and at the same time be absolutely immune from liability for their actions. In effect, they want to "have their cake and eat it too." Such a result, however, ignores the imperative of providing some form of deterrence to constitutional abuses.

III. Allowing Prison Disciplinary Committee Members A Qualified Immunity Strikes The Proper Balance Between The Need To Protect Such Officials From Retaliatory Lawsuits And The Need To Protect The Fundamental Constitutional Right Of Prisoners.

It is clear that the proper balance to be struck between the right of prisoners to a damage remedy and the legitimate concerns of prison IDC members, is to afford

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*The appropriate analogy to the instant case would be that of a police officer who also served as a part-time magistrate, issuing search warrants upon application by his or her fellow officers, review of which went to the Chief of Police. Surely, such an official would not be entitled to absolute immunity. In fact, such a conflicting dual role is inimical to all notions of due process.

**Moreover, grand jurors work under the close supervision and direction of officials who are afforded absolute immunity—the Chief Judge and the prosecutor.

the latter only a qualified immunity from damage liability. Officials who seek qualified immunity have an increasing arsenal available to them to promptly dispose of any insubstantial "harassment" lawsuits with a minimum of cost and inconvenience.

For example, in *Butz,* this Court recognized that, "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and stated:

> Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 US, at 250, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops. 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Butz, 438 U.S. at 507-508. Moreover, under this Court's recent modification of the qualified immunity standard, the defendant is entitled to immunity if it can be shown that the constitutional right allegedly violated was not clearly established or that exceptional circumstances existed which excused the officials' ignorance of a clearly established right, thus allowing for prompt disposition without the necessity of pretrial discovery proceedings. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). If the defendant's qualified immunity claim is denied by the trial court, he or she is entitled to a pretrial appeal of that ruling. *Mitchell v. Forsyth,* — U.S. — (No. 84-335, 53 U.S.L.W. 4798,4802-4803, June 19, 1985).

These legal weapons available to defendants who seek qualified immunity are more than sufficient to protect them from any perceived threat of harassment. In the context of prison discipilinary cases, all these IDC officials have to do is follow the clear and simple constitutional requirements of *Wolff v. McDonnell,* 418 U.S. 539 (1974), and they have no reason to fear harassment or liability. In fact, subsequent to *Harlow,* the subjective intent of an IDC official—which is all too often a salient factor in incidents of abuse of prisoners' rights—is no longer sufficient to sustain a constitutional claim.

The Defendants, however, make several unconvincing claims as to why qualified immunity is insufficient to provide adequate protection to IDC members. They argue that if IDC members are afforded only qualifed immunity, and are thereby exposed to civil damage liability, the viability of the prison disciplinary system would be seriously crippled. They assert that prison officials would be chilled from serving on IDC's and that those who do serve would inevitably be influenced in their actions by the threat of retaliatory lawsuits. (Defendants' brief at 26-27). Similar arguments have been made by executive government officials over the years and have, for the most part, been properly rejected.* This Court has repeatedly held that allowance of only a qualified immunity placed no undue burden on executive government officials with greater responsibilities than prison IDC members. *See,*

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*Exposure to damage liability is insufficient to support a grant of absolute immunity to government officials. In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court found that qualified immunity was sufficient to protect "that segment of the executive branch of a state government that is . . . most frequently exposed to situations which can give use to claims under § 1983—the local police officer." *Scheuer v. Rhodes,* 416 U.S. 232, 244-245 (1974).

e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974) (state governor); *Butz v. Economou,* 438 U.S. 478 (1978) (federal cabinet member); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (presidential aides); *Mitchell v. Forsyth* — U.S. — (No. 84-335, 53 U.S.L.W. 4798, June 19, 1985). (United States Attorney General in matters of national security).

As Justice Brennan cautioned in dissent in *Barr v. Matteo,* 360 U.S. 564 (1969), "the courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of public business", as such an argument "is a gossamer web self-spun without a scintilla of support to which one can point." 360 U.S. at 588-589. Further, as one commentator has observed:

> Such arguments offer a wry blend of fairy tale and horror story. The picture of the unfettered public servant selflessly using his complete freedom for the good of society is heartwarming, but ignores human nature and the history of our liberties, which vividly demonstrate the apparently inevitable result of putting any unbridled powers in the hands of the executive. R.J. Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303, 339, (1959).

As this Court recognized in *Butz,*

> It is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. 438 U.S. at 506-507.

The business of prison officials is to maintain order within their institutions. For this reason, such officials are notorious for their claims that every step taken to protect the rights of prisoners will inevitably lead to a breakdown in institutional discipline and security. In *Ex*

Parte Hull, 312 U.S. 546 (1941) prison officials argued that a regulation requiring that habeas corpus petitions first be submitted to prison authorities before being transmitted to the court was necessary to maintain prison discipline. In *Lee v. Washington,* 390 U.S. 333 (1968), prison officials argued that racial segregation of prisoners was necessary to maintain good order and discipline. In *Johnson v. Avery,* 393 U.S. 483 (1969), prison officials argued that a regulation which barred jailhouse lawyers from assisting fellow prisoners with writs was necessary to maintain discipline. All of these arguments were rejected by this Court. The same result should obtain here and this court should reject the argument that absolute immunity for IDC officials is necessary to maintain the viability of the prison disciplinary system.

The Defendants also argue that to deprive them of absolute immunity would require them to undergo the burden and expense of discovery and a trial. The defendants' claims concerning burdensome discovery proceedings and trials is grossly exaggerated. As established in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), unless the defendant violates the clearly established constitutional rights of a prisoner, there will be no discovery and no trial. Secondly, the reality of prisoner litigation is that the vast majority of cases are disposed of on the complaint alone, without requiring any response from the defendants at all. Of those prisoners whose complaints survive initial dismissal by the courts, few attempt discovery and fewer still actually get discovery. *See* Turner, When Prisoners Sue; A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 611, 617, 624-625, 639 (1979).

The issue of expense to IDC members is simply a sham. As the Defendants and their counsel are well

aware, the government not only pays the litigation expenses of IDC Defendants, but also provides government lawyers to defend them, free of charge.*

* * * * *

Relying upon a laundry list of hyperbolic assertions, the Defendants argue that rejection of their claim to absolute immunity will result in a flood of litigation against prison IDC officials. They posit that the "flexible nature of due process requirements will permit prisoners to argue that, under the circumstances of their case, the disciplinary committee departed too far from trial procedures in this or that particular"; that "every IDC ruling adverse to the prisoner—*e.g.*, every piece of evidence admitted or excluded, every continuance granted or denied, every unfavorable finding, and every punishment meted out—will be a potential count in a *Bivens* suit seeking extravagant sums in compensatory and punitive damages," and, that, in many cases, "an adverse judgment of the size typically sought in a *Bivens* suit would result in the loss of their homes and savings." (Defendants' Brief at 26.)

None of these overstated claims is supportable in fact. The "flexible nature" of due process does not mean that prisoners will be unlimited in the claims they may bring. In fact, the opposite is true. The flexibility given to prison officials under the limited due process require-

*That explains how the Defendants have been able to appeal this $9000.00 case to the Seventh Circuit, sought rehearing in that court and pursued a writ of certiorari in this Court. Unlike private litigants who must retain counsel and bear the expense of litigation, government officials, like the Defendants here, are unfettered by the usual restraints of market forces, and can exhaustively appeal the most modest judgments against them, with no personal cost whatsoever.

ments in the prison context means that many prisoner claims will be determined not to be based upon "clearly established constitutional rights," and will be dismissable under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Moreover, many of the "potential *Bivens* counts" which the Defendants foresee—those based upon evidentiary rulings, the grant or denial of continuances, and the entry of findings—will be found, on motion to dismiss or summary judgment, not to involve the deprivation of a clearly established constitutional right *(Harlow)*, or, on the other hand, not to involve constitutional deprivations at all *(Wolff)*. What will be left to proceed to discovery and trial will be a small number of substantial constitutional claims, as in the instant case, which deserve to proceed to trial, and which justify a verdict of liability.

Further, it is regrettable that the Defendants show such little faith in the jury system, expressing the fear that juries will award the "extravagant sums" sought by prisoner plaintiffs in constitutional actions. Despite the Defendants' fears, juries are well able to render reasonable damage awards based upon the evidence before them, as this case graphically demonstrates. Juries simply are not in the habit of awarding "extravagant" damage awards, least of all to such disfavored litigants as prisoners.

Plaintiffs recognize that a monetary judgment against an individual defendant may prove burdensome. The answer, however, is not immediate resort to judicially mandated absolute immunity, thereby depriving prisoners of an essential remedy for constitutional deprivations. If the government is truly concerned with the financial exposure of its prison officials, it can move to indemnify them for any monetary judgments entered against them.

Alternatively, the government can amend the Federal Tort Claims Act to allow claims directly against the government for deprivations which occur at IDC hearings. *See Davis v. Passman,* 442 U.S. 228, 245-247 (1979); *Carlson v. Green,* 446 U.S. 14, 18-20 (1980). Or, the government can implement procedural safeguards similar to those approved in *Butz* and hire indendent hearing officers, such as administrative law judges, to preside at prison IDC hearings, who may, unlike prison guards, then meet the requirements for absolute "quasi-judicial" immunity. However, in the absence of such alternative solutions, this Court should not undertake the unwarranted and unjustifiable step of radically extending the doctrine of absolute immunity to protect prison officials who serve on IDCs from the consequences of their unconstitutional actions.

* * * * *

The Defendants also predict dire consequences to both the prison disciplinary system and the federal courts, as a purported influx of prisoner suits will result unless IDC members are afforded absolute immunity. The Defendants support this argument by citing a statistic which informs that 35% of the Seventh Circuit's civil docket is made up of "prisoner suits" (Defendants' Brief at 25).

In reality, the Defendants' statistic is highly misleading. When "prisoner suits" are separated into civil rights and habeas corpus categories, it is revealed that only 7.42% of the civil cases pending on June 30, 1983 in the District Courts of the Seventh Circuit were prisoner civil rights cases.* Moreover, this percentage must be further reduced in order to properly analyze the Defend-

*These statistics are taken from the Annual Report of the Director of the Administrative Office of the U.S. Courts (1983).

ants' contention, because the civil rights category includes injunctive as well as damages cases.

Most importantly, prisoner damages lawsuits against prison officials who are acting as IDC members comprise a very small percentage of suits filed against prison officials. The Seventh Circuit has expressly sanctioned damages suits against IDC members for at least 11 years. See *Chapman v. Kleindienst,* 507 F.2d 1246 (7th Cir. 1974). Yet, in that time, it has reviewed less than 15 prisoner damage claims against prison disciplinary board members. And, in the majority of those cases, the claims were substantial and the prisoner prevailed. This is hardly evidence of a barrage of harassing litigation, as the Defendants contend.

Any problematic increase in the caseload of federal courts must not be alleviated by closing the courthouse door to prisoners with legitimate grievances. As this Court recognized in *Davis v. Passman,* 442 U.S. 228, 248 (1979), in rejecting a similar argument that the courts would be deluged with a particular class of claims, the most fundamental answer to such concerns was that provided by Mr. Justice Harlan concurring in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971):

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

* * * * *

In *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803), this Court recognized that "the very essence of

civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." And, it has also been recognized that: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Biven v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 395 (1971). Nevertheless, the Defendants argue that the availability of administrative review and habeas corpus relief provide a fully effective remedy for prisoners, which obviates the need for personal damage actions. (Defendants' Brief at 32-33).

However, neither administrative review nor habeas corpus relief can make whole the prisoner who has already suffered substantial deprivations at the hands of a prison disciplinary committee, as did the Plaintiffs here. Prisoners upon whom discipline is imposed—such as being transfered to segregation—must typically seek administrative or habeas corpus relief *pro se,* or begin a letter-writing search for *pro-bono* counsel. Given the inherent difficulties in both corresponding and litigating from segregation, administrative or habeas corpus proceedings in most, if not all, such cases can only be instituted well after the prisoner has spent considerable time in segregation and has suffered substantial injury. Therefore, since the injury in most instances cannot be prevented by such non-damage remedies, adoption of absolute immunity would leave a prisoner without any remedy whatsoever.* It is this painful reality which the Defendants cavalierly ignore

*This would be the result here where Plaintiffs' *pro se* complaint was not even filed with the clerk until well after the Plaintiffs had been relegated to the particularly oppressive conditions of segregation, and where no proceedings were commenced until well after they had been released from segregation.

when they posit ultimate release from segregation as an adequate remedy.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982) this Court recognized,

> In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantes. *Butz v. Economou, supra,* at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S., at 410 ('For people in Bivens' shoes, it is damages or nothing'). It is this recognition that has required the denial of absolute immunity to most public officers.

Moreover, the availability of a constitutional damage remedy serves two vital purposes. One is to compensate the plaintiff for his or her loss. The second and equally important purpose is to deter government officials from committing constitutional wrongs. *See Butz v. Economou,* 438 U.S. 478, 505 (1978). The availability of a damage remedy to prisoners for deprivation of their constitutional rights at IDC hearings is, clearly, the only effective means by which to deter such constitutional abuses from occurring.* Administrative, injunctive or habeas corpus relief given to a prisoner for deprivations of his or her rights at an IDC hearing is so attenuated from the IDC members personally as to have virtually no effect on the subsequent conduct of IDC members, because they are not named parties to those proceedings and they have no personal stake in the outcome. *See Carlson v. Green,* 446 U.S. 14 (1980).**

*It is "almost axiomatic" that the threat of damages has a deterrent effect, *Imbler v. Pachtman,* 424 U.S. 409, 442 (1976) (White, J., concurring in judgment), particularly so when the individual official faces personal financial liability.

**For a graphic example of the lack of deterrent value of an injunctive order, see *Adams v. Carlson,* 375 F.Supp. 1228 (S.D. Ill. 1974) (on remand), a case decided under the very

(Continued on following page)

IV. Even If Absolute Immunity Is Extended To The Adjudicatory Acts Of Prison IDC Members, The Defendants Here Are Not Entitled To Such Immunity For The Non-Adjudicatory Act Of Proffering Additional Charges Against Plaintiffs, Without Notice, In The Midst Of The Hearing.

As the opinion in *Butz v. Economou* makes clear, executive officials who perform quasi-judicial functions may seek absolute immunity only for those acts which are adjudicatory in nature. Even assuming, for purpose of argument, that the Defendant IDC members here would qualify for such immunity, it would not benefit them in this case. The Defendants here, after being confronted with the abject weakness of the original charges against Plaintiffs, took it upon themselves to bring additional charges against them during the hearings *without prior notice*, and proceeded to find the Plaintiffs guilty on those

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(Continued from previous page)

policy statement on discipline at issue here. In *Adams*, after being directed to do so by the Seventh Circuit, 488 F.2d 619 (7th Cir. 1973), federal prison officials provided new disciplinary hearings to 49 prisoners who had been disciplined on 112 work stoppage charges. At the new hearings, only one or two of the 143 witnesses requested by the prisoners were called, no guards were called, and, not surprisingly, all 49 prisoners were reconvicted on all 112 charges. Confronted with these results, the District Court ordered the 49 prisoners released from segregation, some 18 months after they were originally locked up.

The lack of a deterrent value in internal administrative review proceedings is illustrated in the case at bar by the fact that the reviewing official, the Warden, never discussed this case with the IDC members after he admittedly became aware that they had violated the requirements of the BOP policy statement by proffering new charges without notice (Tr. pp. 276-7)

new charges.* Thus, the major due process violation found by the jury here—the bringing of additional charges without notice—is clearly not an adjudicatory function.**

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*In footnote 14 at page 22 of their brief, the Defendants assert that their activities which went beyond the bounds of quasi-judicial behavior—including the initiation of new charges by the IDC against the Plaintiffs at the hearing itself—"did not form the basis for the due process violations found in this case." What the Defendants conveniently omit from this assertion is that the IDC Defendants not only brought such additional charges against the Plaintiffs, they did so *without notice*—a combination of non-adjudicatory actions (bringing charges and giving notice of those charges), which even the Defendants admit at page 7 of their brief, formed the basis for the jury's verdict.

**The Defendants imply in footnote 8 of their brief that the proffering of these new charges without notice did not really matter, first because "Plaintiff Saxner admitted that he had committed the additional offenses and in any event [Saxner's] possession of the document was essentially incontrovertible." That Saxner admitted he committed these offenses is categorically false. It is even belied by the Defendant's own "record" of the hearing. Moreover, as Saxner stated, both at the hearing and at trial, he was *innocent* of the charges because what he mailed from the Prisoners Mailbox was a press release —which was permissible, rather than a manuscript which was not—and because the labor union document he possesed was openly kept in the prison library and was therefore not contraband. Tr. 11-19, 114-116, JA 58-63, 66-67, 93.

Secondly, the Defendants assert that "there is no indication" that the new charges proffered by the committee "resulted in the imposition of any additional punishment" (Defendants' Brief at p.8, f.n. 8). This is belied both by the evidence and by logic. First, the new charges were proffered only *after* it was shown by the Plaintiffs that the original charge was groundless. Therefore, the Committee must have thought that the additional charges were necessary to support the severe punishment meted out. Secondly, even if it is assumed that the new charges were only supplemental, it is obvious that someone who is "convicted" of three charges will be given a more severe punishment than one "convicted" on only one charge. Moreover, even if the Defendants' argument were accepted at face value, the issue is one of *damages* rather than *liability*; the Defendants remain guilty of a constitutional violation and the Plaintiffs have shown damage which flows from the violation—i.e. fear, mental pain, and suffering—which is unrelated to the punishment of segregation. *See Carey v. Piphus*, 435 U.S. 247 (1978).

This fact distinguishes the instant case from *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982) on which the Defendants rely, where the act complained of—the decision not to allow the testimony of certain witnesses as cumulative—was found by the Fourth Circuit to be an exercise of quasi-judicial discretion in making an evidentiary ruling. Indeed, the language of the Court in *Ward* makes clear that had it heard the *Saxner* case, it would in all likelihood have reached the same result as that reached by the Seventh Circuit. The Court in *Ward* stated:

> Our ruling illustrates the principle that every case in which immunity is claimed for members of the Adjustment Committee should be considered on its own facts, and with reference to the particular procedure under which the disciplinary hearing is held. To qualify for absolute immunity, the action involved must be of a judicial character. . . Absolute immunity will not attach to action taken by the members of a committee whose functions may be properly classified as administrative or investigative rather than adjudicatory.
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> We are not concluding that in connection with all prison disciplinary hearings the members of the Adjustment Committee enjoy absolute immunity. Perhaps this case would be different if the Plaintiff had been denied absolutely any notice of the charge against him, or if he had been denied the right to confront and cross-examine his accusers at the disciplinary hearing (though this right is circumscribed in *Wolff*), but that is not the claim of error here.

Ward, 690 F.2d at 1108-1109.

The facts of the IDC hearings involved in the instant case reveal that the Defendants not only sat in judgment of the Plaintiffs, but also participated in the investigation

of the charges against the Plaintiffs,* extensively interrogated them about constitutionally protected activities, and, when the pretextual nature of the original charges was exposed, caucused in the middle of the disciplinary hearing and, without notice, proffered additional, equally spurious charges against Plaintiffs. Without pause, they then found Plaintiffs guilty of those new charges. The Defendants clearly are not entitled to absolute immunity for this multifarious course of conduct.

The Defendants argue, however, that their activities in participating in the investigation, in questioning Plaintiffs at the hearings, and in initiating new charges against Plaintiffs during the course of the proceedings are not "incompatible with a quasi-judicial role." In support, the Defendants observe that grand juries, which are quasi-judicial bodies, conduct investigations, question witnesses, and make charging decisions. (Defendants' brief at 22-23, note 14).

This argument is spurious. While it is true that grand jurors perform all of the cited activities, they do not also sit as trial jurors in cases where they have conducted the investigation, questioned the witnesses, and proffered charges, as the Defendant IDC members did here.

The multiple roles played by the Defendant IDC members here have forced them to request immunities far beyond that afforded to any government officials: They seek the immunity of grand jurors for investigating and proffering charges; the immunity of prosecutors for questioning witnesses; and the immunity of judges for adjudi-

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*There was evidence that at least one of the Defendants, Cleavinger, participated in the investigation of the Plaintiffs, a non-judicial function which does not require absolute immunity. *Hampton v. Hanrahan*, 484 F.2d 602 (7th Cir. 1973).

cating at the hearings. The very fact that the Defendants must resort to such an argument reveals the enormous length to which the doctrine of absolute immunity must be stretched to embrace the conduct of prison officials such as these defendants.

V. CONCLUSION

An important concern expressed by this Court is that grants of absolute immunity are appropriate only when the defendant official establishes that public policy so requires. *Butz v. Economou,* 438 U.S. 478, 506 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 808 (1982). The Defendants here have made no showing that any public policy requires that they be granted absolute immunity. In fact, the result urged by the Defendants here would, as noted in *Butz,* result in a policy which is "contrary to the course of decision in this Court from the very early days of the Republic." *Butz,* 438 U.S. at 487.

To grant prison IDC members absolute immunity would be to deprive prisoners of their basic right to a damage remedy for violation of their constitutional rights. Such a result is ill considered and unnecessary. Prisoners, perhaps more than any other powerless group in our society, have historically looked to the courts for protection from, and redress for, constitutional abuses inflicted upon them by prison officials. To deny prisoners access to the courts, and to a damage remedy for the deprivation of their constitutional rights, would leave them at the mercy of officials whose goals of a tightly run, trouble

free institution ofttimes result in policies which conflict with the fundamental rights of prisoners.*

As noted in *Imbler v. Pachtman,* 424 U.S. 409, 421 (1976) this Court's decisions on the immunities afforded to government officials from constitutional claims are "not products of judicial fiat." The Defendant IDC members here do not meet the necessary prerequisites for "quasi-judicial" absolute immunity afforded to select executive officials as established in *Butz v. Economou,* 438 U.S. 478 (1978). They do not adjudicate in a process in which their independence guarantees the impartiality of their decisions, nor do there exist sufficient procedural safeguards at IDC proceedings to insure the reliability of their rulings. Therefore, to afford these prison officials absolute "quasi-judicial" immunity would be a radical and unwarranted extension of the doctrine as articulated in *Butz.* For these reasons, the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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*In fact, allowing a legal damage remedy for violations of constitutional rights furthers penological goals by providing prisoners a non-violent method of redress through which to channel their sense of having been wronged by prison officials.